

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

Evenstar Master Fund SPC, et al.,

Petitioners,

v.

Jing Cao,

Respondent.

Case No. 2:20-cv-02333-KJD-BNW

ORDER

Before the Court are two related motions. First, Evenstar Master Fund SPC (Evenstar) filed a motion to compel Ms. Cao to comply with two subpoenas. ECF No. 18. Ms. Cao responded (ECF No. 31), and Evenstar replied (ECF No. 37). Ms. Cao also filed a motion to quash the subpoenas that, for brevity, relies on her response brief. ECF No. 35. Evenstar responded (ECF No. 38), and Ms. Cao replied (ECF No. 49). The parties also filed several supplemental briefs. ECF Nos. 42, 43, 54, 55, 63.¹

I. Background

This case arises out of litigation in the Cayman Islands. Specifically, Evenstar is a party to a case before the Grand Court of the Cayman Islands. In that case, Evenstar alleges that it owns a minority share of Fangs Holding Limited (Fang). Evenstar further alleges that the Chairman and CEO of Fang, Vincent Mo, has been engaged in self-dealing (to Fang and Evenstar's detriment). As is relevant to the motions before the Court, Evenstar alleges that Fang entered into a deal with Next Decade Investments Limited (Next Decade) and Media Partner Technology Limited (Media Partner) (both entities owned by Mr. Mo and/or his family) to purchase shares of dubious value for several million dollars (thereby enriching Mr. Mo and his family to Fang's detriment). Additionally, Evenstar alleges that Upsky Enterprises (Upsky) and Research Center on Natural

¹ The Court will not consider these supplemental briefs, as they were filed without leave of court. *See* LR 7-2(g) ("A party may not file supplemental pleadings, briefs, authorities, or evidence without leave of court granted for good cause. The judge may strike supplemental filings made without leave of court.").

1 Conservation (RCNC) (also business entities owned by Mr. Mo and/or his family) have used
2 Fang business assets and/or resources without payment.

3 In this action, Evenstar previously sought permission to obtain discovery under 28 U.S.C.
4 § 1782. ECF No. 1. Section 1782 “authorizes, but does not require, a federal district court to
5 provide judicial assistance to foreign or international tribunals . . . in proceedings abroad” if
6 certain conditions are met. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247
7 (2004); *see also* 28 U.S.C. § 1782. In other words, litigants in foreign tribunals may seek the
8 assistance of the federal courts in obtaining discovery in the United States for use in the foreign
9 tribunal. *See* 28 U.S.C. § 1782. The district judge assigned to this case previously determined that
10 it was appropriate for Evenstar to use Section 1782 to obtain discovery from Ms. Cao (Mr. Mo’s
11 wife) and allowed Evenstar to serve subpoenas on her.² ECF No. 10. However, because the
12 application to obtain discovery under Section 1782 was ex parte, the district judge noted that Ms.
13 Cao could challenge the subpoenas by way of a motion to quash. ECF No. 10 at 3.

14 Ms. Cao did just that, moving to quash the subpoenas under Rule 45 of the Federal Rules
15 of Civil Procedure. ECF No. 35 at 1. Evenstar moved to compel responses to the subpoenas. ECF
16 No. 18.

17 II. Legal Standard

18 Federal Rule of Civil Procedure 45 governs subpoenas. Rule 45 provides that a party may
19 command a non-party to produce documents in that person’s possession, custody, or control by
20 way of a subpoena. Fed. R. Civ. P. 45(a)(1)(A)(iii). A subpoena may also command a person’s
21 presence at a deposition. Fed. R. Civ. P. 45(a)(1)(B).

22 ² The Court will not further discuss the propriety of obtaining discovery through Section 1782 or the *Intel* factors.
23 The district judge assigned to this case already considered the *Intel* factors and determined that they weigh in favor of
24 allowing Evenstar to obtain discovery under Section 1782. ECF No. 10 at 2. The Court considered Ms. Cao’s limited
25 arguments about why discovery should not be had under the *Intel* factors but is not persuaded by these arguments.
26 Accordingly, the Court proceeds to considering Ms. Cao’s arguments regarding why the subpoenas should be
27 quashed under the Federal Rules of Civil Procedure. *See Husayn v. Mitchell*, 938 F.3d 1123, 1128, n.9 (9th Cir.
28 2019) (“Once the court . . . grants the section 1782 application, ‘the ordinary tools of discovery management,
including [Federal Rule of Civil Procedure] 26, come into play; and with objections based on the fact that discovery
is being sought for use in a foreign court cleared away, section 1782 drops out.’ In other words, once a section 1782
application is granted, the ordinary rules of civil procedure relating to discovery shift into place.”) (internal citations
omitted); *In re Vahabzadeh*, No. 20-MC-80116-DMR, 2020 WL 7227205, at *5 (N.D. Cal. Dec. 8, 2020) (same
rule).

1 The scope of discovery under a subpoena issued pursuant to Rule 45 is the same as the
 2 scope of discovery allowed under Rule 26(b)(1). *Proficio Mortg. Ventures, LLC. v. Fed. Sav.*
 3 *Bank*, 2016 WL 1465333, at *3 (D. Nev. Apr. 14, 2016). Rule 26(b)(1) allows a party to obtain
 4 information that is relevant to any claim or defense, proportional to the needs of the case, and
 5 non-privileged. Fed. R. Civ. P. 26(b)(1).

6 A party resisting discovery may, however, serve objections to the subpoena. Fed. R. Civ.
 7 P. 45(d)(2)(B). The party seeking discovery may then move for an order compelling production
 8 of the documents sought. Fed. R. Civ. P. 45(d)(2)(B)(i). The court may order the person to
 9 comply with the subpoena but must protect a non-party from significant expense resulting from
 10 compliance. Fed. R. Civ. P. 45(d)(2)(B)(ii). Conversely, the party resisting discovery may move
 11 to quash the subpoena, which the court must grant if the subpoena: (1) fails to allow a reasonable
 12 time to comply; (2) requires a person to comply beyond the geographical limits specified in Rule
 13 45(c); (3) requires disclosure of privileged or other protected matter, if no exception or waiver
 14 applies; or (4) subjects a person to undue burden. Fed. R. Civ. P. 45(d)(3)(A).

15 The person seeking to quash a subpoena or opposing a motion to compel bears the burden
 16 of establishing why the discovery should not be had. *See Playstudios, Inc. v. Centerboard*
 17 *Advisors, Inc.*, No. 218CV01423JCMNJK, 2019 WL 1995326, at *2 (D. Nev. May 6, 2019)
 18 (“The movant seeking to quash a subpoena bears the burden of persuasion.”); *Krause v. Nevada*
 19 *Mutual Insurance Co.*, 2014 WL 496936, at *3 (D. Nev. Feb. 6, 2014) (person opposing a motion
 20 to compel generally carries the burden to show why the discovery should not be had). If,
 21 however, the relevance of the discovery sought is not apparent, then the party seeking discovery
 22 must make an initial showing of how the discovery sought is relevant. *Krause*, 2014 WL 496936,
 23 at *3.

24 **III. Analysis**

25 Ms. Cao advances six arguments regarding why her motion to quash should be granted
 26 and the motion to compel should be denied. *See* ECF No. 31 at 2-3 (response to motion to
 27
 28

1 compel); ECF No. 35 at 3-4 (motion to quash).³ The Court will address Ms. Cao's six arguments
2 in turn.

3 First, Ms. Cao argues that she does not possess any documents responsive to Evenstar's
4 subpoena. ECF No. 31 at 13.

5 As already discussed, Rule 45 of the Federal Rules of Civil Procedure allows parties to
6 subpoena documents in a person's "possession, custody, or control." Fed. R. Civ. P.
7 45(a)(1)(A)(iii). To the extent Ms. Cao does not have any responsive documents in her
8 possession, custody, or control, the Federal Rules of Civil Procedure do not require her to
9 produce any documents. To the extent Ms. Cao does have documents in her possession, custody,
10 or control, she must produce them (unless otherwise ordered by this Court in this order). The
11 Court notes that Ms. Cao admitted in her reply brief that she subsequently located responsive
12 documents, so it appears she has at least some responsive documents. *See* ECF No. 49 at 2.

13 Second, Ms. Cao argues that she has no responsive, non-privilege testimony to provide.
14 ECF No. 31 at 13-14. Ms. Cao believes that a marital communications privilege will apply to her
15 testimony. *Id.* at 14-15.

16 The Court doubts that Ms. Cao has no non-privileged testimony to provide given her role
17 in Next Decade and Media Partner. In all events, however, she may not avoid her deposition by
18 claiming that all her testimony will be privileged. Ms. Cao must attend her deposition, answer any
19 questions that do not call for privileged information, and assert a privilege objection on a
20 question-by-question basis when appropriate.⁴ *See Consumer Fin. Prot. Bureau v. Glob. Fin.*
21 *Support, Inc.*, No. 315CV02440GPCAHG, 2020 WL 1674584, at *6 (S.D. Cal. Apr. 6, 2020)
22 (deponent may not invoke a privilege to avoid being deposed altogether but may assert the
23 privilege as appropriate on a question-by-question basis); *Nat'l Corp. Tax Credit Funds III v.*

24 ³ In Ms. Cao's reply to her motion to quash, she raises new arguments regarding why each category of documents in
25 the subpoena should be quashed. *See* ECF No. 49. The Court will not consider arguments raised for the first time in a
26 reply brief. *See Autotel v. Nevada Bell Tel. Co.*, 697 F.3d 846, 852 n.3 (9th Cir. 2012) ("[A]rguments raised for the
first time in a reply brief are waived."). However, even if the Court were to consider these arguments, it would not
change the Court's ruling.

27 ⁴ To the extent the parties request that the Court make a determination about the marital communications privilege or
28 any other privilege, the Court declines to make any hypothetical privilege determinations before questions are posed
at Ms. Cao's deposition.

1 *Potashnik*, No. CV073528PSGFMox, 2008 WL 11339608, at *2 (C.D. Cal. June 16, 2008)
2 (“[A] notice of deposition will not be vacated on a claim that the privilege will be asserted.
3 Instead, the party must attend the deposition, answer those questions that are not properly within
4 the scope of the privilege, and claim the privilege as to the specific questions” that call for
5 privileged information); *United States v. Hansen*, 233 F.R.D. 665, 668 (S.D. Cal. Oct. 28, 2005)
6 (same rule).

7 Third, Ms. Cao argues that to extent the discovery sought from her is relevant to the
8 Cayman proceedings, discovery should be obtained from the parties to the proceedings. ECF No.
9 31 at 15-17.

10 The Court is unpersuaded by Ms. Cao’s argument. Ms. Cao’s argument assumes that the
11 parties to the Cayman proceedings would have all the documents sought from Ms. Cao. Other
12 courts have rejected similar arguments and assumptions. *See, e.g., In re NanoPyxis Co., Ltd.*, No.
13 4:17-MC-80151-KAW, 2018 WL 1156838, at *5 (N.D. Cal. Mar. 5, 2018) (rejecting argument
14 that discovery should be obtained from the parties only, because it assumes that the parties were
15 involved in every relevant communication the non-party had). Here, it is not clear to the Court
16 that Ms. Cao has no unique documents (that the parties to the Cayman proceedings would not
17 have). To the contrary, in Ms. Cao’s reply to her motion to quash, she seems to acknowledge that
18 she has at least some documents that are not necessarily subject to discovery in the Cayman
19 proceeding. *See* ECF No. 49 at 2 (Ms. Cao located 39 responsive emails, all but two are subject to
20 discovery in the Cayman proceeding). Ms. Cao is also the director of two companies (Next
21 Decade and Media Partner) that were allegedly part of the self-dealing at issue in the Cayman
22 proceedings. *See* ECF No. 31 at 7. Accordingly, the Court rejects the argument that discovery
23 should only be obtained from the parties to the Cayman proceeding, as it is possible Ms. Cao has
24 responsive documents that the parties to the Cayman proceedings do not have. To reduce the
25 potential burden on Ms. Cao, however, the Court provides instructions below to reduce the
26 likelihood that Ms. Cao will have to produce identical documents that have been produced by
27 other entities or parties to the Cayman proceedings.
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Fourth, Ms. Cao argues that the subpoena requests relating to Next Decade, RCNC, and NYMA are overbroad because they seek discovery that is irrelevant to the Cayman proceedings. ECF No. 31 at 13, 17-19. Specifically, Ms. Cao lists the following categories of documents requested in the subpoena that she believes are irrelevant:⁵

1. Complete financial statements of Next Decade (Request 3);
2. Any payment from RCNC or NYMA to Ms. Cao, Mr. Mo, their family, or Mr. Mo's unrelated companies, including all bank records relating to any payment (Requests 4, 6);
3. Any loan or payment to RCNC or NYMA from Mr. Mo, his family, or his independent companies (Requests 7, 8); and
4. Loan transactions listed in any IRS Form 990 filed by RCNC or NYMA (at any time) relating to Next Decade and various Upsky entities (Requests 9, 10), as well as complete bank records relating to any such loan transactions (Request 11).

ECF No. 31 at 17-18.

As discussed below, the Court reviewed the parties' briefs and is partially persuaded by Ms. Cao's arguments.

As it relates to the financial statements of Next Decade, the Court is *not* persuaded that these documents are irrelevant. As previously discussed, Next Decade was allegedly part of the self-dealing at issue in the Cayman proceedings. *See* ECF No. 31 at 7. Accordingly, its financial statements are highly relevant to the Cayman proceedings, and the Court will order Ms. Cao to respond to Request 3 to the extent she has responsive documents in her possession, custody, or control.⁶

⁵ In Ms. Cao's motion to quash and response to Evenstar's motion to compel, she did not challenge Requests 1, 2, and 5 specifically (except to note that she did not receive any payments from Fang). *See* ECF Nos. 31, 35. Ms. Cao did address these requests specifically for the first time in her reply to her motion quash. *See* ECF No. 49. These arguments are waived. *See Autotel v. Nevada Bell Tel. Co.*, 697 F.3d 846, 852 n.3 (9th Cir. 2012) ("[A]rguments raised for the first time in a reply brief are waived."). However, were the Court to consider Ms. Cao's arguments, it would not change its ruling. Requests 1, 2, and 5 are relevant to Mr. Mo's alleged self-dealing as it relates to Fang; Ms. Cao may have unique documents responsive to these requests; and the Court is ordering Evenstar not to intentionally seek duplicative documentation that has already been produced. *See* ECF No. 18-1 at 30-31, 33 (Requests 1, 2, and 5).

⁶ Ms. Cao argued in her reply brief that Next Decade does not prepare financial statements. ECF No. 49 at 8. If no financial statements exist for Next Decade and/or Ms. Cao does not have them in per possession, custody, or control, then she may assert this, and no documents need be produced. At oral argument, Evenstar raised concerns that Ms.

1 As to the other requests Ms. Cao takes issue with, the Court agrees that Requests 4, 6, 7,
2 8, 9, 10, and 11 are overbroad. See ECF No. 18-1 at 32-38. These requests seek a wide range of
3 financial documents related to RCNC, NYMA, Upsky, and Fang. *See id.* Evenstar alleges in the
4 amended petition that Upsky and RCNC (business entities owed by Mr. Mo and/or his family)
5 have used Fang business assets and/or resources without payment. ECF No. 18 at 8. Accordingly,
6 requests for documents related to RCNC, Upsky, and Fang are not irrelevant to the Cayman
7 proceedings and Mr. Mo's alleged self-dealing. However, the Court is unsure how documents
8 related to NYMA are relevant to the claims or defenses in the Cayman proceedings. The Court
9 understands that RCNC allegedly purchased NYMA (ECF No. 18 at 8), but this does not explain
10 how NYMA is relevant to Mr. Mo's alleged self-dealing as it relates to Fang/the Cayman
11 proceedings.

12 In all events, however, Requests 4, 6, 7, 8, 9, 10, and 11 are so broad that they seek
13 information that would be irrelevant to the Cayman proceedings. For example, Request 4 seeks
14 "[a]ll documents concerning any payment (however characterized, and to any person or entity) to
15 you, any Mo Family Member and/or any Mo Entity from: (a) RCNC; and/or from 2015 to date,
16 NYMA." ECF No. 18-1 at 32. Request 6 requests "for every payment from RCNC, NYMA or
17 Fang [to Ms. Cao, any Mo family member, and/or any Mo entity], complete copies of any and all
18 agreements under which such payments were made, as well as bank statements and
19 check/electronic funds transfer records, showing in each case the source of the payment and its
20 amount." *Id.* at 33. Similarly, (according to Evenstar) Requests 7-11 "seek documents about
21 money flows and transactions involving RCNC and NYMA." ECF No. 37 at 13; *see also* ECF
22 No. 18-1 at 34-37 (Requests 7-11). These requests are all overbroad, as they go beyond exploring
23 any alleged self-dealing Mr. Mo engaged in (to Fang and Evenstar's detriment). Accordingly, the
24 Court will not order Ms. Cao to respond to Requests 4, 6, 7, 8, 9, 10, or 11 as written.

25 The Court will, in its broad discretion to control discovery, order the parties to meet and
26 confer about narrowing these requests to seek only those documents that are relevant to Mr. Mo's

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28 Cao may be defining "financial statements" in a particular way to avoid producing these documents. Evenstar may probe what records Next Decade keeps at Ms. Cao's deposition to address this concern.

1 alleged self-dealing related to Fang. The Court also notes that Evenstar appears to have obtained
2 at least some documents in other jurisdictions related to the entities Mr. Mo controls. To avoid
3 undue burden on Ms. Cao, Evenstar is instructed not to intentionally seek duplicative
4 documentation from Ms. Cao. To the extent Evenstar cannot discern when certain documents
5 would be duplicative, it may seek them from Ms. Cao, and it may seek unique documents from
6 Ms. Cao. Ms. Cao may request a meet and confer if she believes documents subpoenaed from her
7 are duplicative of documents *produced* by other entities, Mr. Mo, or Fang.

8 Fifth, Ms. Cao argues that Evenstar's motion to compel is substantially duplicative of a
9 motion to compel documents from certain Mo entities that Evenstar filed in the Southern District
10 of New York. ECF No. 31 at 2, 19. The Court has addressed this concern above by directing the
11 parties to meet and confer to narrow the subpoena requests and by directing Evenstar to not
12 intentionally seek duplicative information. Again, Ms. Cao may request a meet and confer to the
13 extent she believes Evenstar is requesting identical documents that have already been produced.
14 The Court expects the parties to work together in good faith to ensure that duplicative documents
15 are not sought and unique documents are not withheld.

16 Sixth, Ms. Cao argues that she should not be ordered to produce discovery until after the
17 close of the pleadings in the Cayman proceedings, as the scope of discovery will be defined at
18 that point. ECF No. 31 at 3, 20. Ms. Cao explains that if Mr. Mo and Fang were to admit certain
19 facts in the Cayman pleadings, discovery would not be needed on these facts. *Id.* at 20.

20 The Court understands Ms. Cao's point but is unpersuaded that discovery should be
21 further delayed. As an initial matter, Ms. Cao did not cite any authority for the proposition that
22 ordering discovery to begin before the pleadings close in the Cayman proceedings would be
23 inappropriate. *See id.* This is consistent with controlling authority providing that discovery may
24 be sought under Section 1782 even when a foreign proceeding is not pending or even imminent.
25 *Intel*, 542 U.S. at 247. Here, a foreign proceeding is pending, and the Court finds that it is
26 appropriate for discovery to proceed. However, to prevent any undue burden on Ms. Cao, the
27 Court, in its discretion, will instruct the parties to meet and confer about narrowing or
28

1 withdrawing any document requests that have been mooted by Fang and/or Mr. Mo admitting any
2 facts in the Cayman proceedings.


3 **IV. Conclusion**

4 To summarize the Court's order, Ms. Cao must respond to Requests 1, 2, 3, and 5 to the
5 extent she has documents in per possession, custody, or control. She must do so by March 15,
6 2022. Ms. Cao must also sit for her deposition. The parties must meet and confer about narrowing
7 Requests 4, 6, 7, 8, 9, 10, and 11 to seek only those documents that are relevant to Mr. Mo's
8 alleged self-dealing related to Fang. To avoid undue burden on Ms. Cao, Evenstar is instructed
9 not to intentionally seek duplicative documentation from Ms. Cao that has already been produced
10 by an entity, Mr. Mo, or Fang. To the extent Evenstar cannot discern whether certain documents
11 would be duplicative, it may seek them from Ms. Cao, and it may seek unique documents from
12 Ms. Cao. Ms. Cao may request a meet and confer if she believes documents subpoenaed from her
13 are duplicative of documents produced by other entities, Mr. Mo, or Fang. The parties must also
14 meet and confer about narrowing or withdrawing any document requests that have been mooted
15 by Fang and/or Mr. Mo admitting any facts in the Cayman proceedings.

16 **IT IS THEREOFRE ORDERED** that Petitioners' motion to compel (ECF No. 18) is
17 GRANTED in part and DENIED in part consistent with this order.

18 **IT IS THEREFORE ORDERED** that Respondent's motion to quash (ECF No. 35) is
19 GRANTED in part and DENIED in part consistent with this order.

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21 DATED: February 15, 2022.

22 
23 BREND A WEKSLER
24 UNITED STATES MAGISTRATE JUDGE
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